78-1758

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

BRICKLAYERS FRINGE BENEFIT FUNDS, METROPOLITAN AREA, a voluntary unincorporated trust fund, and the DETROIT METROPOLITAN AREA EXECUTIVE COMMITTEE OF THE BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION OF AMERICA, AFL-CIO, a voluntary unincorporated labor organization,
Petitioners,
v.
NORTH PERRY BAPTIST CHURCH OF PONTIAC, a Michigan ecclesiastical corporation, WILLIAMSON COUNTY BANK, a Tennessee banking corporation, and B. R. THOMAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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962-8745 962-8746

TABLE OF CONTENTS

CITATIONS

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Petitioners, the Bricklayers Fringe Benefit Funds, Metropolitan Area, and the Detroit Metropolitan Area Executive Committee of the Bricklayers, Masons and

Plasterers International Union of America, AFL-CIO,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on January 19, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 590 F.2d 207, appears in the appendix to this petition. The District Court's initial ruling, its Order of January 9, 1976, which contained an opinion, its Amended Order of Dismissal as to Pendent Defendants and its Order of January 18, 1977, all of which are unreported, also appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1979. No application was made for a rehearing. On March 27, 1979, an order was entered extending the time for filing a petition for writ of certiorari to June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Hereinafter, "Bricklayers' Union".

QUESTIONS PRESENTED

1. Where a pendent claim (although involving defendants not subject to the federal claim) was an integral part of the federal claim, did the District Court abuse its discretion in refusing to decide the pendent claim?

2. Where a remedy established by state law was used for the purpose of securing satisfaction (in whole or in part) of a federal labor claim, was the District Court required by Federal Rule of Civil Procedure 64 to decide the pendent claim?

STATUTES AND RULE INVOLVED

1. Federal Rule of Civil Procedure 64 provides:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, * * * * The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, *and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action*" (emphasis added).

2. The Michigan mechanics' lien law, P.A. 1891, No. 179, as amended, M.C.L.A. §§570.1, et seq. (M.S.A. §§26.281, et seq.), provides in relevant parts, as follows:

> (i) Section 1: "Every person who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor and the owner, part owner or lessee of any interest in real estate, . . . furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any . . . building . . . and every person who shall be . . . laborer . . . perform any labor or furnish materials . . . to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor upon such . . . building . . . to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced . . . and also to the extent of any subsequent acquired interest of any such owner, part owner or lessee . . . ." M.C.L.A. §570.1 (M.S.A. §26.281).
>
> (ii) Section 5: "Every person, *or his agent or attorney*, whether contractor, subcontractor, materialman or laborer, who wishes to avail himself of the provisions of this statute, shall make and record in the office of the register of deeds . . . a just and true statement or account of the demand due him over and above all legal setoffs, setting forth the time when such materials were furnished or labor performed, and for whom, and containing a correct description of the property to be charged with the lien, and the name of the owner, part owner or lessee, if known, which statement shall be verified by affidavit. * * * *" M.C.L.A. §570.5 (M.S.A. §26.285), emphasis added.

> (iii) Section 10: "Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens recorded in the office of the register of deeds, shall have the effect to continue such lien pending such proceedings. * * * *" M.C.L.A. §570.10 (M.S.A. §26.290).
>
> (iv) Section 25: "All liens or claims for liens which may arise or accrue under the terms of this act shall be assignable, and proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimant [claimants] themselves. * * * *" M.C.L.A. §570.25 (M.S.A. §26.305).

STATEMENT OF THE CASE[2]

Pursuant to a collective bargaining agreement which a contractor[3] had entered into with the Bricklayers' Union, a labor organization representing employees in an industry affecting commerce, the contractor (as employer) was required to make contributions for fringe benefits for, or in respect to the account of, those of his employees who were represented by the Bricklayers'

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[2] Unless the context indicates otherwise, parenthetical references preceded by "R" refer to the pages of the joint appendix filed with the Court of Appeals.

[3] Raymond H. Bellows who did business as Ray Bellows Masonry. Bellows was a defendant in the District Court. He did not appeal the judgment, following default, which was entered against him in that court.

Union. Under the contract, payment of such contribution should have been made to the Bricklayers Fringe Benefit Funds, Metropolitan Area, a trust fund established under, and administered pursuant to, Section 302 of the Labor-Management Relations Act of 1947, as amended, hereinafter "LMRA", 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq. The contractor failed to make the contributions for fringe benefits[4] and the Bricklayers' Union and the Bricklayers Fringe Benefit Funds, Metropolitan Area, instituted suit against him under LMRA §301, 29 U.S.C. §185. The District Court ultimately entered a judgment, following default, against the contractor for the amount of his indebtedness. (R4 — R6, R12 — R15 and R27 — R28.)

Approximately 47 percent of the contractor's indebtedness accrued during the course of a construction project that he had performed for B. R. Thomas and the North Perry Baptist Church of Pontiac on land owned by the Church and the Williamson County Bank. To protect the interests of the contractor's bricklayer-employees with respect to that portion of his indebtedness which had accrued during the course of this construction project, the Bricklayers' Union, pursuant to Michigan's mechanics' lien law, M.C.L.A. §§570.1, et seq. (M.S.A. §§26.281, et seq.), recorded a mechanics' lien on the aforementioned realty. Count III

[4] Contributions are payable for each hour worked by each bricklayer. The rights of the bricklayer and his family to coverage for medical, hospital, pension, optical, dental, pooled holiday and other benefits are entirely dependent upon proper payment of contributions by employers. Participation in plaintiffs' programs is a significant part of the bargained-for compensation of bricklayers and an important aspect of their families' economic security.

of the Amended Complaint which was filed in the District Court sought to foreclose that mechanics' lien. (R15 — R18.)

The District Court dismissed Count III.[5] (R30 and R34 — R37.) the Sixth Circuit, on January 19, 1979, affirmed, holding that (1) the District Court did not abuse its discretion in declining to exercise its pendent jurisdiction over the State mechanics' lien claim and (2) the petitioners' foreclosure claims did not fall within the remedies contemplated by Rule 64 of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

The holding below, as it applies to an industry as fragmented and interdependent as the construction industry, represents a serious diminution of the protection of workers' rights by the federal judiciary and, as it involves collection of amounts employers have been found to owe to fringe benefit programs, deprives fiduciaries of those programs of a needed device to do that which the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§1001, et seq., commands to protect workers and their families.

1. The problems inherent in the construction industry are well known. See, e.g. Judge (now Solicitor General) McCree's opinion for the Sixth Circuit in

[5] Respondent B. R. Thomas was also a party (defendant) to the "pendent" claim. At the District Court, his counsel stated that he (Thomas) had no interest in the subject matter of the controversy. No appearance was made on his behalf in the Court of Appeals and it is unlikely that any appearance for him will be made in this Court.

General Insurance Company of America v *Lamar Corporation*, 482 F.2d 856, 860 (1973).[6] Many construction firms have little capital. Small firms which handle only one job at a time (a not untypical situation) cover all of their overhead with revenues from that job (or out of profits from earlier jobs). Indeed, one of the things peculiar to the construction industry is that financing is outside the control of contractors. Financing is obtained from, or through, the owner. See Abrams, "The Residential Construction Industry," in Adams (ed.), *The Structure of American Industry*, pp. 114, 117, 123-24 (The Macmillan Company, New York, N.Y., 2d ed. 1954), and Lefkoe, *The Crises in Construction*, pp. 30 — 43 (The Bureau of National Affairs, Inc., Washington, D.C., 1970).

It is because of this situation that all states including Michigan have enacted statutes, such as the mechanics' lien statute, imposing derivative liability for labor and labor related claims in the construction industry. The purpose of each is to impose responsibility for payment of such claims on the person who actually controls the purse strings. If an employer for any reason does not pay all of his labor obligations, the party who benefited from the labor is derivatively liable.

It is obvious that the claim against the respondents (the pendent defendants) and the claim against the employer are related. Absent the claim against the

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[6] The Sixth Circuit was recently faced with construction industry problems in *Selby* v *Ford Motor Company*, 590 F.2d 642 (Jan. 11, 1979), and the problems were discussed at some length at pp. 647-48.

employer, there would be no claim against the respondents. If the employer had satisfied that portion of the claim which accrued on the respondents' project, then petitioners claim against the respondents would also be satisfied. We have stressed the relationship between the principal federal claim against the employer and the pendent claim because, at the original hearing on the respondents' motion for summary judgment, the District Court stated that "the claims are totally unrelated" (R30). In arriving at that conclusion, the District Court was clearly in error.

The "commonsense policy of pendent jurisdiction" is, this Court has stated, "the conservation of judicial energy and the avoidance of multiplicity of litigation." *Rosadio* v *Wyman*, 397 U.S. 397, 405, 90 S. Ct. 1207, 25 L.Ed.2d 442 (1970). For the doctrine to be applicable, the "state and federal claims must arise from a common nucleus of operative fact. But if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceedings, then assuming substantiality of the federal issues, there is *power* in federal court to hear the whole." *United Mine Workers* v *Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966) (footnote omitted).

As has been indicated, there is such a relationship between the federal and pendent claims here. The federal claim arose pursuant to a collective bargaining agreement the employer had entered into with the Bricklayers' Union. Absent that agreement, the employer would not have been liable to petitioners. Absent such liability, the respondents would have no derivative liability to plaintiffs.

The Sixth Circuit, in affirming, recognized that the District Court had "discretion to exercise jurisdiction with respect to such pendent state claims under *Aldinger* v *Howard*, 427 U.S. 1 (1976), and *United Mine Workers* v *Gibbs*, 383 U.S. 715 (1966)." (Slip Opinion, p. 2.) However, it held "that the District Judge did not abuse his discretion in declining to exercise pendent jurisdiction, especially in light of the fact that the foreclosure claims appear to raise unresolved questions of Michigan law." (*Ibid.*) However, nowhere in the opinion is it stated what "unresolved" questions of Michigan law are raised by the pendent claim.

Virtually every court which has considered the situation, has held that contributions owing to union trust funds can be recovered by the Trustees of such funds under either a mechanic's lien statute or the Miller Act, 40 U.S.C.A. §§270a, et seq., or a state equivalent. *J. W. Bateson Company, Inc.* v *United States ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund*, 434 U.S. 586, 588, 98 S. Ct. 873, 55 L.Ed.2d 50, n. 1 (1978); *United States ex rel. Sherman* v *Carter*, 353 U.S. 210, 218-20, 77 S. Ct. 793, 1 L.Ed.2d 776 (1957); *United States Fidelity and Guaranty Company* v *Arizona State Carpenters Health and Welfare Trust Fund*, 584 P.2d 60 (Ariz. App., 1978); *Bernard* v *Indemnity Insurance Company of North America*, 162 Cal. App. 2d 479, 329 P.2d 57 (1958); *Tobler and Oliver Construction Company* v *Board of Trustees of the Health and Insurance Fund for Carpenters Local Union No. 971*, 84 Nev. 438, 442 P.2d 904 (1968); *Pipeline Industry Benefit Fund* v *Aetna Casualty and Surety Insurance Company*, 503 P.2d 1286 (Okla. App. 1972); *Mathis* v *Thunderbird Village, Inc.*, 236 Or. 425, 389 P.2d 343 (1964); *Martin* v *William Casey & Sons, Inc.*, 8 N.Y.2d 728, 201 N.Y.S.2d

104, 167 N.E.2d 646 (1960), affirming 5 App. Div.2d 185, 170 N.Y.S.2d 228 (1958); and *Crabtree* v *Lewis*, 86 Wash.2d 282, 544 P.2d 10 (1975).

It is true that most of the cases cited in the previous paragraph construed the Miller Act, *supra*, or state equivalents, and not a mechanics' lien statute. But this distinction is of no importance. As this Court has stated, the purpose of such statutes "was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects." *J. W. Bateson Company, Inc., supra*, 434 U.S. at 589. See also *United States ex rel. Sherman* v *Carter, supra*, 353 U.S. at 216-17, and *Bernard* v *Indemnity Insurance Company of North America, supra*, 162 Cal. App. 2d at 484-85, 329 P.2d at 60-61.

There is no reason to construe the Michigan mechanics' lien statute differently than the manner in which this Court[7] or the state courts have construed the statutes involved in those cases. Certainly, there is no contrary Michigan authority. Indeed, the Michigan statute is consistent with this position. Section 5 of the statute allows any laborer "or his agent or attorney" to make and record the lien. M.C.L.A. §570.5 (M.S.A. §26.285). Section 25 of the Michigan statute authorizes assignment of the lien and provides that "proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample

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[7] Although the union trust funds did not get any relief in the *J. W. Bateson Company, Inc.*, case, the reason for the denial of relief has no relevance to any issues in the instant matter. In this connection, see notes 5 and 6 to the Court's opinion in that case and accompanying text.

power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimant [claimants] themselves. * * * *" M.C.L.A. §570.25 (M.S.A. §26.305). And, as the Michigan Supreme Court has stated, the Michigan "mechanics' lien statute, because of its remedial nature, must be construed liberally to carry out its intended purpose of benefiting and protecting . . . laborers. . . ." *Spartan Asphalt Paving Company* v *Grand Ledge Mobil Home Park*, 400 Mich. 184, 188-89, 253 N.W.2d 646, 649 (1977). The fact that union trust funds are not explicitly mentioned is irrelevant because, as the Michigan Court said (although in a slightly different context) in that case:

> "The construction industry has become much more specialized than it was in the Nineteenth Century when the mechanics' lien statute was enacted. To accept defendant's invitation to rule that an object is excluded from lien coverage unless expressly mentioned in the statute would have the effect of removing the specialty contractors from the protection of the statute. More importantly, it would contravene the intent of the Legislature to provide a remedial liberally construed statute 'to establish, protect, and enforce by lien the rights of mechanics and other persons furnishing labor or materials for the' improvement of land." 400 Mich. at 190, 253 N.W.2d at 649-50.

Petitioners in this case are a group of trust funds established under federal law for the sole and exclusive purpose of providing pension, medical, dental, hospital, optical, pooled holiday pay, disability and other forms of union-negotiated security programs for bricklayers and their families and the union which represents those bricklayers.

Each trust fund is controlled by a Board of Trustees, half of whom are selected by the union and half by the employers. The programs they administer are the results of collective bargaining. They have been subject to the relevant strictures of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§141, et seq.,[8] since their inception.

The assets of the funds are composed entirely of employer contributions and the income generated from investment of those contributions. The ability of the Funds to provide the types of benefits bargained for rests upon collection of the sums due as contributions. The rate of contribution is set by collective bargaining and the agreements setting out the rates are enforceable under Section 301 of LMRA, 29 U.S.C. §185. This lawsuit was instituted pursuant thereto.[9]

As in all 301 litigation, the applicable law is federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers Union of America* v *Lincoln Mills of Alabama*, 353 U.S. 448, 456-57, 77 S. Ct. 912, 1 L.Ed.2d 972 (1957).

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what parties may or may not do in certain situations. Other problems will lie in the

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[8] Particularly Section 302(c) (5) of LMRA, as amended, 29 U.S.C. §186(c)(5), added to the statute 30 years ago as part of the Taft-Hartley amendments.

[9] It appears that, insofar as employers are concerned, by virtue of Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1), the Federal District Courts have exclusive jurisdiction of civil actions to recover fringe benefit contributions.

penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Textile Workers* v *Lincoln Mills, supra*, 353 U.S., at 457, citation omitted.

The fashioning after more than 20 years, continues.

The national labor policy in respect to employee benefit plans has evolved over the years through legislation, administrative regulation and judicial decision. The most recent Congressional expression of policy is the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001, et seq. ERISA regulates virtually every aspect of the operation and structure of funds such as those involved here.[10] Its

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[10] ERISA specifically preempts all state laws dealing with fiduciary responsibility, reporting and disclosure, vesting, funding and related matters to the full extent such laws might otherwise affect pension and welfare benefit plans. ERISA §514(a), 29 U.S.C. §1144(a). It forbids any state to classify these plans as insurers, banks, trust companies or investment companies in order to bring them within state statutes regulating such institutions. ERISA §514(b) (2) (B), 29 U.S.C. §1144(b) (2) (B). ERISA enforcement is the responsibility of both the Department of Labor and the Internal Revenue Service, which have supplemented the statute with an impressive array of regulations and other interpretative materials (e.g., see footnote 11, *infra*). In fact, new sections were added to the Internal Revenue Code by ERISA which relate only to plans of the sort involved in this litigation. E.g., ERISA §1014, 26 U.S.C. §413; ERISA §1015, 26 U.S.C. §414; ERISA §2003(a), 26 U.S.C. §4975. The federal concern with, involvement in and regulation of such funds may fairly be characterized as pervasive.

principal purpose is to set standards and a system of regulation which will safeguard the accrued benefits of participant employees and their families.

> "It is hereby declared to be the policy of this Act *to protect* interstate commerce and *the interests of participants in employees benefit plans and their beneficiaries*, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and *by providing* for appropriate remedies, sanctions and *ready access to the Federal courts*" (emphasis added). ERISA §2(b), 29 U.S.C. §1001(b).

Multi-employer plans, such as those involved in the instant case are specifically included in ERISA's coverage (29 U.S.C. §1002(37)(A)). The Trustees are fiduciaries whose duties and liabilities are defined, for the first time, by federal law. It is part of that duty to use every means available to them (which means the courts — no other means being available) to collect delinquent contributions and, except for limited situations specifically covered by regulation, they risk personal liability for deviation from that duty.[11]

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[11] See Prohibited Transaction Exemption 76-1 (1976 P-H Inc. Pension Paragraph 110,083) in which the Department of Labor, exercising its regulatory authority under ERISA, interprets Section 406(a)(1)(B) of the Act, 29 U.S.C. §1106(a)(1)(B), to require collectively bargained multi-employer funds, *as a matter of federal law*, to make "systematic, reasonable and diligent efforts to collect delinquent contributions."

It is part of national labor policy to allow enforcement of collective bargaining agreements in federal courts. That is what 301's minimum meaning is.

The teaching of *Lincoln Mills* is that Section 301 is more than a simple grant of jurisdiction. It carries with it federal substantive law fashioned to effectuate national labor policy, beginning (but not ending) with the texts of the relevant statutes.

The protection of employee rights in pension and welfare benefit programs and collection of the money contracted for (and needed) to properly finance those programs is a part of that national labor policy. A remedy must be fashioned to "effectuate that policy". This Court has suggested sources:

> "The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers* v *Lincoln Mills, supra*, 353 U.S., at 457, citations omitted.

Collection of amounts due to employee pension and welfare programs such as those involved here will not be effectuated, it will be impeded, if the District Court's order of dismissal is allowed to stand. Contrary to *Lincoln Mills*, the remedies required to effectuate the national labor policy in this regard will not be "absorbed as federal law", but will be sliced off and relegated to the exclusive jurisdiction of the state court.

One of the primary Congressional purposes in enacting LMRA §§301 and 302 and the Employee Retirement Income Security Act of 1974, was to protect the wages and fringe benefits of employees. To sanction the District Court's refusal to exercise its jurisdiction ignores the realities of the construction industry and flies in the face of that expressed Congressional purpose. When a construction employer is found to have failed to pay the promised contributions to provide pension and welfare benefits, the remedy must include the right to levy upon and collect from those who actually hold the money, the customers, the financing agencies and the general contractors. It is neither beyond the power of the federal courts nor "the range of judicial inventiveness" required by *Lincoln Mills* to fashion an effective, not an illusory or partial, remedy. In dismissing the pendent claim, the District Court abused its discretion.

2. Petitioners, both in the District Court and the Court of Appeals, also argued that the mechanics' lien foreclosure claim fell within the remedies contemplated by Rule 64 of the Federal Rules of Civil Procedure. Rule 64 provides in relevant parts that:

> "At the commencement of and during the course of an action, all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, ... The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or

> equivalent remedies, however, designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Both the District Court and the Court of Appeals rejected this contention. The Sixth Circuit "[did] not believe that a lien foreclosure proceeding is 'equivalent' to any of these ancillary remedies *because it is not a remedy against the judgment debtor or against a person who is personally indebted to, or in the possession of the property of, the judgment debtor.*" (Slip Opinion, p. 3, emphasis added.) However, in imposing the requirement that, as a prerequisite for using Rule 64, the remedy sought must be a "remedy against the judgment debtor or against the person who is personally indebted to, or in the possession of the property of, the judgment debtor", the Sixth Circuit added an embellishment not found in the rule which appears to be contrary to its purpose.

3. The actions of the District Court and the Court of Appeals serve no policy consideration. Their sole result will be to place one more hurdle in the already difficult path of enforcing the claims of laborers in the construction industry for bargained-for wages and fringe benefits. The actions of the court below benefit the respondents not one iota. If sustained by this Court, the inevitable result will be refiling in a state court. As a general policy consideration, the inevitable consequence of the decision of both courts below will be that a multiplicity of lawsuits in different courts will be required to collect the varying portions of the identical construction industry labor claim.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 3, 1979

APPENDIX

EXCERPT OF PROCEEDINGS
— SEPTEMBER 29, 1975

(In the District Court of the United States
For the Eastern District of Michigan
Southern Division)

Bricklayers Benefit Funds, Metropolitan Area, et al., Plaintiffs, vs Raymond H. Bellows, et al., Defendants. Case Number 5-70231

Proceedings had in the above-entitled matter before the HONORABLE ROBERT E. DeMASCIO, District Judge, Detroit, Michigan, on Monday, September 29, 1975.

Appearances: Sheldon M. Meizlish, Esq., Appearing on behalf of the Plaintiffs.

Richard A. Campbell, Esq., Appearing on behalf of the Defendants.

Elizabeth E. Montgomery, Official Court Reporter 961-5965.

* * *

(6) The Court: Well, the Court agrees with the Defendant. There is no pendent jurisdiction here. The claims are totally unrelated.

The motion to dismiss is granted. These two are totally unrelated to the action.

You present an order, Counsel, and have Mr. Meizlish approve it as to form.

* * *

ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

Bricklayers Fringe Benefit Funds, Metropolitan Area, a voluntary unincorporated trust fund, et al., Plaintiffs, v. Raymond H. Bellows, individually and d/b/a Ray Bellows Mason Contractors, et al., Defendants. Civil No. 5-70231

Plaintiffs filed this action against defendant Raymond H. Bellows under §301 LMRA, 29 U.S.C. §185, to recover monies allegedly due and owing pursuant to the terms of a collective bargaining agreement.[1] Plaintiffs joined the North Perry Baptist Church and the Williamson County Bank and seek to foreclose a mechanics lien plaintiffs filed against them. The basis for that lien is the same debt for which plaintiffs sue defendant Bellows. Defendants North Perry Baptist Church and Williamson County Bank moved to dismiss pursuant to Rule 12(b) (1), Fed.R.Civ.P. These defendants contend that the court lacks subject matter jurisdiction. Plaintiffs argue that the court has pendent jurisdiction to consider its claims against these defendants. Alternatively, plaintiffs argue that Rule 64 Fed.R.Civ.P., which provides that all state remedies providing for seizure of person or property to satisfy judgments are available to federal court litigants, somehow extends this court's jurisdiction to parties necessary for the implementation of those remedies.

[1] Plaintiffs obtained a default judgment against defendant Bellows.

The United States Supreme Court in *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966) held that:

> "Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, the Treaties made, or which shall be made, under their Authority . . .,' U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . . The state and federal claims must derive from a common nucleus of operative fact." p. 725

However, the Supreme Court also recognized that the doctrine of pendent jurisdiction is one of discretion whose "justification lies in considerations of judicial economy, convenience and fairness to litigants. . . ." *Mine Workers* v. *Gibbs*, at 726.

While this court may have the *power* to hear the state claims under the standard in *Mine Workers* v. *Gibbs*, the considerations outlined in that case for exercising our discretion lead us to the conclusion that it would be improper to invoke the doctrine in this case. Plaintiffs have already received a default judgment against defendant Bellows. At this juncture, the only claims left are the state claims. Accordingly, fairness to these litigants would require that a state court determine the propriety of foreclosing a mechanics lien under these

circumstances.[2] Moreover, there would be little economy achieved by hearing the state claims here, rather than dismissing them with the result that plaintiffs refile in state court.

We also reject plaintiffs' alternative contention that Rule 64 Fed.R.Civ.P. somehow provides this court with jurisdiction over the state claims. Rule 82 Fed.R.Civ.P. specifically provides that "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts. . . ."Having previously held that jurisdiction over the state claim is not otherwise present, the court is prevented by Rule 82 from using Rule 64 to obtain jurisdiction over the state claims. We, therefore, lack jurisdiction over the remaining defendants.

Accordingly, IT IS ORDERED that plaintiffs' complaint be and the same hereby is dismissed.

/s/ Robert E. DeMascio
United States District Judge

Dated: January 9, 1976

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[2] Without indicating any view on the merits of the state claims, we note that this matter does not present a routine foreclosure of a mechanics lien because it is plaintiffs and not the contractor that supplied labor or materials who have perfected the lien.

AMENDED ORDER OF DISMISSAL AS TO PENDENT DEFENDANTS

(In the United States District Court
For the Eastern District of Michigan
Southern Division)

Bricklayers Fringe Benefit Funds, Metropolitan Area, a voluntary unincorporated trust fund, et al., Plaintiffs, vs Raymond H. Bellows, individually and d/b/a Ray Bellows Mason Contractors, et al., Defendants. Civil Action No. 75-70231

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 21st day of January, 1976.

Present: HONORABLE ROBERT E. DE MASCIO,
United States District Judge.

In accordance with Federal Rule of Civil Procedure 60(b), the last paragraph of this Court's Order of January 9, 1976, be, and it is hereby, amended to read as follows:

Accordingly, IT IS ORDERED that plaintiffs' amended complaint be and the same is hereby dismissed as to defendants North Perry Baptist Church of Pontiac and the Williamson County Bank, and as to those defendants only.

Hon. Robert E. DeMascio
United States District Judge

A True Copy
Henry R. Hanssen, Clerk
By Sherry Stamps, Deputy Clerk

ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

Bricklayers Fringe Benefit Funds, Metropolitan Area, a voluntary unincorporated trust fund, et al., Plaintiffs, v. Raymond H. Bellows, individually and d/b/a Ray Bellows Mason Contractors, et al., Defendants. Civil No. 5-70231

Plaintiffs in the above-captioned cause having filed with the court a motion for default judgment against defendant B. R. Thomas; and the court having read the briefs of the parties and having heard oral argument on said motion; and it appearing to the court that all parties agree that defendant B. R. Thomas is similarly situated to the defendant North Perry Baptist Church of Pontiac and defendant Williamson County Bank, which defendants were previously dismissed from this lawsuit because the court declined to exercise its pendent jurisdiction over the claims involving them, *see* Order of January 9, 1976; and the court being otherwise fully advised in the premises;

NOW THEREFORE, IT IS ORDERED that plaintiffs' motion for a default judgment against defendant B. R. Thomas be and the same hereby is denied;

IT IS FURTHER ORDERED That plaintiffs' claim against defendant B. R. Thomas be and the same hereby is dismissed;

IT IS FURTHER ORDERED that defendant Williamson County Bank's motion for cost be and the same hereby is denied.

/s/ Robert E. DeMascio
United States District Judge

Dated: January 18, 1977

* * *

OPINION

(United States Court of Appeals
For the Sixth Circuit

Bricklayers Fringe Benefit Funds, Metropolitan Area, Detroit Metropolitan Area Executive Committee of The Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, Plaintiffs-Appellants, v. North Perry Baptist Church of Pontiac, Williamson County Bank and B. R. Thomas, Defendants-Appellees. No. 77-1192.

On Appeal from the United States District Court for the Eastern District of Michigan.

(Decided and Filed January 19, 1979)

Before: LIVELY and MERRITT, Circuit Judges; TAYLOR, District Judge.*

MERRITT, Circuit Judge. The question on appeal is whether a lien foreclosure action is an "ancillary" remedy for the collection of a judgment under Rule 64, Federal Rules of Civil Procedure, and, if not, whether the District Judge abused his discretion in refusing to consider the foreclosure claim as a pendent state claim.

A contractor's employees were laborers on a construction project. They are members of the plaintiff union, the appellant in this case. The contractor failed to make contributions to the union for his employees' fringe benefits as required by their collective bargaining agreement. The labor union brought suit against the contractor for breach of contract under § 301 of the

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* The Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

Labor Management Relations Act, 29 U.S.C. § 185. The District Court entered a default judgment against the contractor for the amount of the unpaid employee fringe benefits.

The union's complaint against the contractor also sought foreclosure of a mechanic's lien against the construction project property owned by a church and a bank who were added party defendants below and are the appellees here. The plaintiff labor union appeals from a District Court order dismissing its mechanic lien foreclosure claim against the church and the bank. These foreclosure claims are characterized on appeal as pendent state claims.

We affirm the District Court's dismissal of the foreclosure claims. The District Court has discretion to exercise jurisdiction with respect to such pendent state claims under *Aldinger* v. *Howard*, 427 U.S. 1 (1976), and *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Our review of the record and briefs in the case disclose that the District Judge did not abuse his discretion in declining to exercise pendent jurisdiction, especially in light of the fact that the foreclosure claims appear to raise unresolved questions of Michigan law.

Neither do we believe that plaintiff's foreclosure claims against the owners of the project fall within the remedies contemplated by Rule 64 of the F.R.Civ.P. governing seizure of property in order to satisfy the judgment against the contractor. For the purpose of executing on a judgment rendered by a federal court, Rule 64 provides "ancillary" remedies including "arrest,

attachment, garnishment . . . and other . . . equivalent remedies." We do not believe that a lien foreclosure proceeding is "equivalent" to any of these ancillary remedies because it is not a remedy against the judgment debtor or against a person who is personally indebted to, or in possession of the property of, the judgment debtor. Moreover, Rule 64 provides for such execution on a federal judgment "in the manner provided by the law of the state in which the District Court is held." We find no federal or Michigan authority characterizing a lien foreclosure action under Michigan law as an "ancillary" remedy for the purpose of executing on a judgment. Indeed, it is unresolved under Michigan law whether a labor union is entitled to bring such a lien foreclosure action on behalf of its members at all.

Accordingly, the judgment of the District Court is affirmed.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1758

BRICKLAYERS FRINGE BENEFIT FUNDS, METROPOLITAN AREA, a voluntary unincorporated trust fund, and the DETROIT METROPOLITAN AREA EXECUTIVE COMMITTEE OF THE BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION OF AMERICA, AFL-CIO, a voluntary unincorporated labor organization,

Petitioners,

v.

NORTH PERRY BAPTIST CHURCH OF PONTIAC, a Michigan ecclesiastical corporation, WILLIAMSON COUNTY BANK, a Tennessee banking corporation, and B. R. THOMAS,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 24(5), the Bricklayers Fringe Benefit Funds, Metropolitan Area, et al., the Petitioners, submit this supplement to their Petition for a Writ of Certiorari.

I

On June 28, counsel for Petitioners received a letter from Benjamin T. Hoffiz, Jr., Esq., of Troy, Michigan, advising that he had discussed the Petition for a Writ of Certiorari with Doctor John Marine, the Pastor of the North Perry Baptist Church of Pontiac, one of the Respondents, who "concluded that the church will permit the Appeal Process without obtaining Appellate Counsel on the premise that

the United States Supreme Court will have before it the record of the Court of Appeals on which to determine whether it will grant an Appeal. Succintly [sic], the North Perry Baptist Church will not have representation, nor will an Attorney file an Appearance, while you seek Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit."

II

Since this Court's decision in *Aldinger* v *Howard, Treasurer of Spokane County,* 427 U.S. 1, 96 S. Ct. 2413, 49 L.Ed. 2d 276 (1976), a number of courts have considered the exercise of pendent party jurisdiction in situations, such as the instant one,[1] where federal courts had exclusive jurisdiction over the federal count. A number of the courts have sanctioned the use of pendent party jurisdiction under such circumstances. See, e.g., *Ortiz* v *United States Government,* 595 F.2d 65 (C.A. 1, 1979), *Dick Meyers Towing Service, Inc.* v *United States,* 577 F.2d 1023 (C.A. 5, 1978), *Transok Pipeline Co.* v *Darks,* 565 F.2d 1150 (C.A. 10, 1977), and *Pearce* v *United States,* 450 F. Supp. 613 (D. Kan., 1978). The Ninth Circuit has, of course, reached the contrary result and has refused to allow exercise of pendent party jurisdiction under any circumstances. See, e.g., *Ayala* v *United States,* 550 F.2d 1196 (1977).

III

At page 14 (n. 10), of the Petition for a Writ of Certiorari, we stated that the federal concern with, involvement in and regulation of jointly administered trust funds, such as the one involved in this matter, "may fairly be characterized as pervasive." An example of another aspect of the pervasiveness of the regulation may be found in Judge Charles Joiner's opinion in *Central States Southeast and Southwest Areas Pension Fund, et al.* v *Hitchings Trucking, Inc., et al.,* ..... F. Supp. ....., 251 BNA Pension Law Reporter D-1 (E.D. Mich., July 20, 1979). In that case, Judge Joiner pointed out that ERISA mandates that employees be provided with benefits regardless of whether the fund collected the contractually required contributions from their employer:

> "ERISA was intended to stabilize the rights and liabilities involved in pensions established by collective bargaining. Congress in its findings and declaration of policy provided:
>
> " 'The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be

[1] Insofar as Count I of the Complaint (the count against the employer, George Morse) is concerned, the District Court had exclusive jurisdiction by virtue of Section 502(e) (1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §1132(e) (1).

made and safeguards be provided with respect to the establishment, operation and administration of such plans . . . that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.' 29 U.S.C. §1001(a).

"Stability and protection requires assurance of adequate funding and the prevention of arbitrary termination rights. ERISA protects employees' rights to pension funds under pension trusts if the employees qualify. 29 U.S.C. §§1052, 1053 and 1054. Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether or not an employee qualifies. See Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, Opinion 76-89, 221 BNA Pension Reporter R-24. * * *

"A ruling by this court in an action between the employer and the fund could not adversely affect the rights of the employees to make claims against the fund when they became due, regardless of whether the employer has made payments or whether this court would have ordered the employer to make payments. It is not unlikely that they might prevail on the same theory that is being asserted in this case by the plaintiff.

"A ruling adverse to the plaintiff in this court would place the plaintiff in an anomalous position. It would have no defense whatsoever to the claims being made by the employees. As a result of this decision, it would be required to meet the financial burden of ERISA's guarantees in the form of pension payments without corresponding contributions

to the defendant's employees and similarly situated employees. As the plan covers several hundred thousand participants, with over 1400 contributing employers, the actuarial soundness of the fund would be compromised."

Conclusion

We again request that the petition for a Writ of certiorari be granted.[2]

Respectfully submitted,

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Dated: September 11, 1979.

[2]The Sixth Circuit recently decided another case involving the pendent party jurisdiction and applicability of Federal Rules of Civil Procedure 64 issues. *Carpenters District Council of Detroit, etc., et al.* v *George E. Morse, individually and d/b/a Residential Framers Co., et al.* (C.A. 6, #77-1071; Orders of June 13, 1979 and July 23, 1979). It is expected that a petition for a writ of certiorari from the Sixth Circuit's decision in that case will be filed with this Court by the end of this month.